

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE BURLINGTON INSURANCE COMPANY,

Plaintiff,

V.

WATERWAY RAINSCREEN LLC, a Washington limited liability company; and JOHN URAL, an individual.

Defendant.

Case No. 2:19-cv-00033

COMPLAINT FOR DECLARATORY JUDGMENT

The Burlington Insurance Company, for its complaint against Defendants Waterway Rainscreen LLC and John Ural alleges as follows:

L. NATURE OF ACTION

1. The Burlington Insurance Company seeks a declaration that an insurance policy it issued to defendant Waterway Rainscreen, LLC does not provide defense or indemnity coverage to either Named Insured Waterway Rainscreen LLC or its principal John Ural with respect to a lawsuit filed against them.

II. PARTIES

2. The Burlington Insurance Company (“TBIC”) is a North Carolina corporation with its principal place of business in Hartford, Connecticut.

3. Upon information and belief, Waterway Rainscreen LLC (“Waterway Rainscreen”) was a Washington limited liability company.

4. Upon information and belief, John Ural (“Ural”) is an individual residing in the state of Washington and operated Washington limited liability company Waterway Rainscreen.

III. JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction under 28 U.S.C. § 1332 because it has complete diversity of citizenship between TBIC and the defendants and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

6. Venue is proper in this Court under 28 U.S.C. § 1331 and LR 3(e)(1) because at least one defendant resides in this district and a substantial number of the events or omissions giving rise to Waterway Rainscreen and Ural's claims for insurance coverage occurred in the Western District of Washington.

7. This Court has the authority to determine the parties' respective rights and other legal obligations pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. The dispute between the parties with respect to the coverage available to Waterway Rainscreen and Ural related to the Stuc-O-Flex lawsuit creates a justiciable controversy.

IV. FACTS

8. The insurance coverage issues in this declaratory judgment action arise out of a lawsuit filed on November 29, 2017 by Stuc-O-Flex International, Inc. (“Stuc-O-Flex”) against Waterway Rainscreen and Ural in King County Superior Court (the “Underlying Lawsuit”). The Underlying Lawsuit contains additional defendants, Low and Bonar, Inc., Pacific West Industries, Inc., Mike Czerwinski, and Jim Hewitt, who are not parties to this declaratory judgment action.

9. In the Complaint filed in the Underlying Lawsuit, Stuc-O-Flex alleges that it entered into a contract with Ural and his company, Waterway Rainscreen, for the manufacturing of Stuc-O-Flex's trademark protected Rainscreen, which is designed for use for certain types of construction.

10. The Complaint contains claims against Waterway Rainscreen and Ural for Breach of Contract, Tortious Interference with Business Expectancy, Trade Name Infringement, and Consumer Protection Act Violations.

11. On or about January 12, 2018, counsel for Waterway Rainscreen and Ural tendered the Complaint in the Underlying Lawsuit to TBIC.

12. TBIC denied that the Complaint in the Underlying Action alleged any claims potentially covered under the Policy, but nevertheless agreed to defend Waterway Rainscreen and Ural under a full reservation of rights, and has been defending them in the Underlying Lawsuit.

13. On September 17, 2018, Stuc-O-Flex filed its First Amended Complaint in the Underlying Lawsuit.

14. The First Amended Complaint added an additional party, Pacific West Industries, Inc., as a defendant in the Underlying Lawsuit. The First Amended Complaint contains claims against Waterway Rainscreen and Ural for Breach of Contract, Tortious Interference with Business Expectancy, Trademark Violation, Consumer Protection Act Violations, and a claim for Alter Ego/Piercing the Corporate Veil.

15. TBIC has continued to defend Waterway Rainscreen and Ural under a full reservation of rights.

16. On September 20, 2018, the Underlying Lawsuit was removed to the Western District of Washington (Seattle) and assigned case number 2:18-cv-01386-RAJ.

V. THE INSURANCE POLICY

17. Waterway Rainscreen is the Named Insured under TBIC commercial general liability policy no. 361BW33554, with a policy period of October 28, 2015 to October 28, 2016 (the “Policy”).

18. Subject to its terms, conditions, limitations, and exclusions, the Policy provides the following relevant policy language related to Coverage A, Bodily Injury and Property Damage:

1
SECTION I – COVERAGES

2
**COVERAGE A BODILY INJURY AND PROPERTY
DAMAGE LIABILITY**

3
1. Insuring Agreement

4
a. We will pay those sums that the insured becomes
5 legally obligated to pay as damages of “bodily injury” or
6 “property damage” to which this insurance applies. We
7 will have the right and duty to defend the insured against
8 any “suit” seeking those damages. However, we will
9 have no duty to defend the insured against any “suit”
10 seeking damages for “bodily injury” or “property
11 damage” to which this insurance does not apply. We
12 may, at our discretion, investigate any “occurrence” and
13 settle any claim or “suit” that may result. But:

14
(1) The amount we will pay for damages is
15 limited as described in Section III – Limits Of
16 Insurance; and

17
(2) Our right and duty to defend ends when we
18 have used up the applicable limit of insurance in
19 the payment of judgments or settlements under
20 Coverages A or B or medical expenses under
21 Coverage C.

22
No other obligation or liability to pay sums or
23 perform acts or services is covered unless
24 explicitly provided for under Supplementary
25 Payments – Coverages A and B.

26
b. This insurance applies to “bodily injury” and “property
27 damage” only if:

1
(1) The “bodily injury” or “property damage” is
2 caused by an “occurrence” that takes place in the
3 “coverage territory”;

4
(2) The “bodily injury” or “property damage”
5 occurs during the policy period; and

6
(3) Prior to the policy period, no insured listed
7 under Paragraph 1. of Section II – Who Is An
8 Insured and no “employee” authorized by you to
9 give or receive notice of an “occurrence” or claim,
10 knew that the “bodily injury” or “property
11 damage” had occurred, in whole or in part. If such
12 a listed insured or authorized “employee” knew,
13 prior to the policy period, that the “bodily injury”
14 or “property damage” occurred, then any
15 continuation, change or resumption of such
16 “bodily injury” or “property damage” during or

1 after the policy period will be deemed to have
2 been known prior to the policy period.

3 c. “Bodily injury” or “property damage” which occurs
4 during the policy period and was not, prior to the policy
5 period, known to have occurred by any insured listed
6 under Paragraph 1. of Section II – Who Is An Insured
7 or any “employee” authorized by you to give or receive
8 notice of an “occurrence” or claim, includes any
continuation, change or resumption of that “bodily injury”
or “property damage” after the end of the policy period.

9 d. “Bodily injury” or “property damage” will be deemed
10 to have been known to have occurred at the earliest time
11 when any insured listed under Paragraph 1. of Section II –
12 Who Is An Insured or any “employee” authorized by you
13 to give or receive notice of an “occurrence” or claim:

14 (1) Reports all, or any part, of the “bodily injury”
15 or “property damage” to us or any other insurer;
16 (2) Receives a written or verbal demand or claim
17 for damages because of the “bodily injury” or
“property damage”; or
18 (3) Becomes aware by any other means that
“bodily injury” or “property damage” has occurred
or has begun to occur.

19 e. Damages because of “bodily injury” include damages
20 claimed by any person or organization for care, loss of
21 services or death resulting at any time from the “bodily
22 injury”.

23 19. The Coverage A – Bodily Injury and Property Damage Liability contains the
24 following relevant exclusions:

25 **2. Exclusions**

26 This insurance does not apply to:

27 **a. Expected Or Intended Injury**

“Bodily injury” or “property damage” expected or
intended from the standpoint of the insured. This
exclusion does not apply to “bodily injury” resulting from
the use of reasonable force to protect persons or property.

b. Contractual Liability

“Bodily injury” or “property damage” expected or
intended from the standpoint of the insured. This

1 exclusion does not apply to “bodily injury” resulting from
2 the use of reasonable force to protect person or property.

3 *****

4 **k. Damage To Your Product**

5 “Property damage” to “your product” arising out of it or
6 any part of it.

7 **l. Damage To Your Work**

8 “Property damage” to “your work” arising out of it or any
9 part of it and included in the “products-completed
operations hazard”.

10 **m. Damage To Impaired Property Or Property Not
11 Physically Injured**

12 “Property damage” to “impaired property” or property
13 that has not been physically injured, arising out of:

14 (1) A defect, deficiency, in adequacy or dangerous
15 condition in “your product: or “your work”; or
16
17 (2) A delay or failure by you or anyone acting on
18 your behalf to perform a contract or agreement in
19 accordance with its terms. This exclusion does
20 not apply to the loss of use of other property
21 arising out of sudden and accidental physical
22 injury to “your product” or “your work” after it
23 has been put to its intended use.

24 *****

25 **o. Personal And Advertising Injury**

26 “Bodily injury” arising out of “personal and advertising
27 injury”.

28 *****

29 20. The Coverage A – Bodily Injury and Property Damage Liability contains the
30 following relevant definitions:

31 3. “Bodily injury” means bodily injury, sickness or disease
32 sustained by a person, including death resulting from any of these
33 at any time.

34 *****

1 8. "Impaired Property" means tangible property, other than
2 "your product" or "your work", that cannot be used or is less
3 useful because:

4 a. It incorporates "your product" or "your work" that is
5 known or thought to be defective, deficient, inadequate or
6 dangerous; or
7 b. You have failed to fulfill the terms of a contract or
8 agreement; if such property can be restored to use by the
9 repair, replacement, adjustment or removal of "your
10 product" or "your work" or your fulfilling the terms of the
11 contract agreement.

12 *****

13 13. "Occurrence" means an accident, including continuous or
14 repeated exposure to substantially the same general harmful
15 conditions.

16 *****

17 17. "Property damage" means:

18 a. Physical injury to tangible property, including all
19 resulting loss of use of that property. All such loss of use
20 shall be deemed to occur at the time of the physical injury
21 that caused it; or
22 b. Loss of use of tangible property that is not physically
23 injured. All such loss of use shall be deemed to occur at
24 the time of the "occurrence" that caused it.

25 *****

26 21. "Your Product"

27 a. Means:

28 (1) Any goods or products other than real
29 property, manufactured, sold, handled, distributed
30 or disposed of by:

31 (a) You;

32 (b) Others trading under your name; or

1 (c) A person or organization whose
2 business or assets you have acquired; and

3 (2) Containers (other than vehicles), materials,
4 parts or equipment furnished in connection with
5 such goods or products.

6 b. Includes:

7 (1) Warranties or representations made at any
8 time with respect to the fitness, quality, durability,
9 performance or use of "your product"; and

10 (2) The providing of or failure to provide
11 warnings or instructions.

12 c. Does not include vending machines or other property
13 rented to or located for the use of others but not sold.

14 22. "Your Work"

15 a. Means:

16 (1) Work or operations performed by you or on
17 your behalf; and

18 (2) Materials, parts or equipment furnished in
19 connection with such work or operations.

20 b. Includes:

21 (1) Warranties or representations made at any time with
22 respect to the fitness, quality, durability, performance or
23 use of "your work", and

24 (2) The providing of or failure to provide warnings or
25 instructions.

26 21. Subject to its terms, conditions, limitations, and exclusions, the Policy provides
27 the following relevant policy language related to Coverage B, Personal and Advertising Injury
Liability:

28 **COVERAGE B- PERSONAL AND ADVERTISING
29 INJURY LIABILITY**

30 **1. Insuring Agreement**

31 a. We will pay those sums that the insured becomes
32 legally obligated to pay as damages because of "personal
33 and advertising injury" to which this insurance applies.

1 We will have the right and duty to defend the insured
2 against any “suit” seeking those damages. However, we
3 will have no duty to defend the insured against any “suit”
4 seeking damages for “personal and advertising injury” to
5 which this insurance does not apply.

6 b. This insurance applies to “personal and advertising
7 injury” caused by an offense arising out of your business
8 but only if the offense was committed in the “coverage
9 territory” during the policy period.

10 22. The Coverage B – Personal and Advertising Injury Liability contains the
11 following relevant exclusions:

12 **2. Exclusions**

13 This insurance does not apply to:

14 **a. Knowing Violation Of Rights Of Another**

15 “Personal and advertising injury” caused by or at the
16 direction of the insured with the knowledge that the act
17 would violate the rights of another and would inflict
18 “personal and advertising injury”.

19 *****

20 **c. Material Published Prior to the Policy Period**

21 “Personal and advertising injury” arising out of oral or
22 written publication of material whose first publication
23 took place before the beginning of the policy period.

24 *****

25 **e. Contractual Liability**

26 “Personal and advertising injury: for which the insured
27 has assumed liability in a contract or agreement. This
exclusion does not apply to liability for damages that the
insured would have in the absence of the contract or
agreement.

28 **f. Breach of Contract**

29 “Personal and advertising injury” arising out of a breach
30 of contract, except an implied contract to use another’s
31 advertising idea in your “advertisement”.

32 **g. Quality Or Performance of Goods-Failure To
33 Conform To Statements**

1 “Personal and advertising injury” arising out of the failure
2 of goods, products or services to conform with any
3 statement of quality or performance made in your
4 “advertisement”.

5 *****

6 **i. Infringement Of Copyright, Patent, Trademark Or**
7 **Trade Secret**

8 “Personal and advertising injury” arising out of the
9 infringement of copyright, patent, trademark, trade secret
10 or other intellectual property rights. Under this exclusion,
11 such other intellectual property rights do not include the
12 use of another’s advertising idea in your “advertisement”.

13 However, this exclusion does not apply to infringement,
14 in your “advertisement”, of copyright, trade dress or
15 slogan.

16 *****

17 **I. Unauthorized Use of Another’s Name or Product**

18 “Personal and advertising injury” arising out of the
19 unauthorized use of another’s name or product in your e-
20 mail, domain name or metatag, or any other similar tactics
21 to mislead another’s potential customers.

22 *****

23. The Coverage B – Personal and Advertising Injury Liability contains the
24 following relevant definitions:

25 1. “Advertisement” means a notice that is broadcast or published
26 to the general public or specific market segments about your
27 goods, products, or services for the purpose of attracting
customer or supporters. For the purpose of this definition:

28 a. Notices that are published include material placed on
29 the Internet or on similar electronic means of
30 communications; and

31 b. Regarding web-sites, only that part of a web-site that is
32 about your goods, products or services for the purposes of
33 attracting customers or supporters is considered an
34 advertisement.

35 *****

36 14. “Personal and advertising injury” means injury, including
37 consequential “bodily injury”, arising out of one or more of the
38 following offenses:

- 1 a. False arrest, detention or imprisonment;
- 2 b. Malicious prosecution;
- 3 c. The wrongful eviction from, wrongful entry into, or
4 invasion of the right of private occupancy of a room
dwelling or premises that a person occupies, committed
by or on behalf of its owner, landlord, or lessor;
- 5 d. Oral or written publication, in any manner, or material
6 that slanders or libels a person or organization or
disparages a person's or organization's goods, product or
services;
- 7 e. Oral or written publication, in any manner, of material
8 that violates a person's right of privacy;
- 9 f. The use of another's advertising idea in your
10 "advertisement"; or
- 11 g. Infringing upon another's copyright, trade dress or
slogan in your "advertisement".

12 24. The Policy contains an Intellectual Property exclusion that applies to both

13 Coverage A and B and states, in relevant part:

14 **THIS ENDORSEMENT CHANGES THE POLICY.**
15 **PLEASE READ IT CAREFULLY.**

16 **EXCLUSION - INTELLECTUAL PROPERTY**

17 **This endorsement modifies insurance provided under the
following:**

18 **COMMERCIAL GENERAL LIABILITY COVERAGE
19 PART PRODUCTS/COMPLETED OPERATIONS
LIABILITY COVERAGE PART**

20 A. Paragraph **D**. of this endorsement is added to **2. Exclusions of
21 Section I - Coverage A - Bodily Injury and Property Damage
Liability** under the Products/Completed Operations Liability
Coverage Form.

22 B. Paragraph **D**. of this endorsement is added to **2. Exclusions of
23 Section I - Coverage A - Bodily Injury and Property Damage
Liability** under the Commercial General Liability Coverage
Form.

24 C. Paragraph **D**. of this endorsement is added to **2, Exclusions of
25 Section I - Coverage B - Personal and Advertising Injury
26 Liability** under the Commercial General Liability Coverage
Form.

1 D. This insurance does not apply to claims for “any injury or
2 damage” that results from the actual or alleged infringement or
3 violation of any intellectual property rights or laws, including but
4 not limited to:

5 1. Copyright;
6 2. Patent;
7 3. Trade dress;
8 4. Trade name;
9 5. Trade secret; or
10 6. Trademark.

11 E. The following definition is added:

12 For the purposes of this endorsement, “any injury or damage”
13 means any injury or damage covered under any Coverage Part to
14 which this endorsement is applicable, and includes “bodily
15 injury”, “property damage” or “personal and advertising injury”
16 as defined in the applicable Coverage Part.

17 **FIRST CLAIM FOR RELIEF**

18 (Declaratory Judgment – No Duty to Defend)

19 25. TBIC re-alleges the allegations of paragraphs 1 through 24 as if fully set forth
20 herein.

21 26. There is an actual controversy between TBIC and Waterway Rainscreen and
22 Ural involving the claim to coverage by Waterway Rainscreen and Ural for the claims alleged
23 in the Underlying Lawsuit.

24 27. TBIC requests a declaratory judgment that based on the terms, conditions,
25 limitations, and exclusions of the Policy, and the fact that based upon the evidence in the
26 Underlying Lawsuit the Policy does not provide coverage for indemnity, TBIC does not have
27 any ongoing obligation to defend Waterway Rainscreen or Ural in the Underlying Lawsuit.

28 **SECOND CLAIM FOR RELIEF**

29 (Declaratory Judgment – No Duty to Indemnify)

30 28. TBIC re-alleges the allegations of paragraphs 1 through 27 as if fully set forth

1 herein.

2 29. TBIC requests a declaratory judgment that based on the terms, conditions,
3 limitations, and exclusions of the Policy and the evidence in the Underlying Lawsuit, TBIC
4 does not have any obligation to indemnify Waterway Rainscreen or Ural for the damages
5 sought in the Underlying Lawsuit.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, TBIC prays for judgment as follows:

8 1. For a declaration that TBIC does not currently have, and never had, any
9 obligation to defend Waterway Rainscreen and John Ural in the Underlying
10 Lawsuit.

11 2. For a declaration that TBIC does not currently have and can never have any
12 obligation to indemnify Waterway Rainscreen and John Ural in the Underlying
13 Lawsuit.

14 3. Awarding TBIC costs and disbursements that are recoverable by law.

15 4. Awarding TBIC such other and further relief as the Court may deem just and
16 appropriate.

17 DATED this 9th day of January, 2019.

18 Davis Wright Tremaine LLP
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